RS MUTHIAH

v.

PEMBINAAN FIBA SDN BHD

HIGH COURT MALAYA, IPOH
BALIA YUSOF JC
[CIVIL SUIT NO: 22-134-99]
11 MAY 2004

LEGAL PROFESSION: *Practice and etiquette - Acceptance of brief - Embarrassment - Personal relationship between solicitor and party or witness in proceedings - Wife of managing director of defendant company acting as solicitor for defendant company - Managing director the principal witness in proceedings - Whether solicitor should have accepted brief - Whether r. 3(b)(ii) Legal Profession (Practice & Etiquette) Rules 1978 bars solicitor from representing defendant company*

LEGAL PROFESSION: *Practice and etiquette - Conflict of interest - Defendant's present solicitor having previously acted for plaintiff - Access to documents and confidential information pertaining to plaintiff - Whether there could be conflict of interest such that justice would not be seen to be done*

LEGAL PROFESSION: *Practice and etiquette - Pecuniary interest - Company secretary of defendant acting as solicitor for defendant - Whether solicitor pecuniarily interested in outcome of matter before court - Whether r. 27(a) Legal Profession (Practice & Etiquette) Rules 1978 would debar solicitor from appearing for defendant company - Meaning of pecuniary interest - Any interest relating to money or money's worth - Any interest that can be converted into money - Any interest the object of which is to make money*

LEGAL PROFESSION: *Practice and etiquette - Professional independence - Wife of managing director of defendant company acting as solicitor for defendant company - Company secretary of defendant acting as solicitor for defendant - Whether difficult for solicitor to maintain professional independence - Whether incompatible with best interest of administration of justice - Legal Profession (Practice & Etiquette) Rules 1978, r. 5(a) - Right to counsel, whether without limitation - Observance of practice and etiquette rules and respectability of Bar*

This was an application by the plaintiff to disqualify an advocate and solicitor, one Ms Malliga Sumathri ('Ms Malliga'), and/or her firm, Messrs Malliga & Associates ('Messrs Malliga Assoc'), from representing the defendant company ('the defendant') in the matter herein before the court. In support of the application, it was submitted that: (i) the managing director (and also the main witness) of the defendant, one Mr Balachandran Kandasamy ('the D-MD'), is the husband of Ms Malliga; (ii) there would be a conflict of interest as Messrs Malliga Assoc had once acted for the plaintiff; (iii) as the company secretary of the defendant, Ms Malliga would have a pecuniary interest in the outcome of the matter; and (iv) it would be difficult for Ms Malliga to maintain her professional independence.

Held (allowing the plaintiff's application):

[1] The fact that Ms Malliga is the wife of the D-MD (who is also the principal witness of the defendant in the matter herein before the court) would surely bring her under the circumspection of r. 3(b)(ii) of the Legal Profession (Practice & Etiquette) Rules 1978 ('the Rules), namely, 'embarrassment where there is some personal relationship between she and a party or a witness in the proceedings'. Hence, on this ground alone, Ms Malliga would be barred from acting for the defendant here. (pp 921 c-h & 922 a)

[2] Having once acted for the plaintiff in the past, Messrs Malliga Assoc might have had access to certain documents and confidential information pertaining to the plaintiff. It would, therefore, find itself in a very peculiar situation if it became the plaintiff's adversary now. There could be a conflict of interest such that justice would not be seen to be done. (p 922 b-e)

[3] As the company secretary of the defendant, Ms Malliga would be pecuniarily interested in the outcome of the matter herein before the court. Rule 27(a) of the Rules would, in the circumstances, debar her from appearing for the defendant in the said matter. Any interest relating to money or money's worth, or any interest that can be converted into money, or any interest the object of which is to make money, is a pecuniary interest. As an officer of the court, the solicitor must always conduct himself with decorum and avoid situations that lead to a conflict of interest. Where a solicitor is pecuniarily interested, the rule of prudence and good sense dictates that he should not accept the brief. (pp 922 f-h & 923 a)

[4] Having regard to Ms Malliga's spousal relationship with the D-MD as well as her position as the company secretary of the defendant, it would be most difficult for her to maintain her professional independence in the matter in the manner contemplated by r. 5(a) of the Rules. It was incompatible with the best interest of the administration of justice. The right to counsel is not without limitation. The due observance of the provisions of the Rules is essential for an effective and respectable Bar. (pp 923 b-d & 924 c)

[Ms Malliga to withdraw from representing the defendant in this matter.]

Case(s) referred to:
Abdul Razak Ahmad v. Majlis Bandaraya Johor Bharu [1995] 4 CLJ 339 HC ***(refd)***
Black v. Taylor [1993] 3 NZLR 403 ***(foll)***
Carlingwood Motors Ltd v. Nissan Canada Inc [2001] ACWSJ 676321 ***(refd)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 2 MLJ 230 ***(foll)***
Kayla Beverly Hills (M) Sdn Bhd & Anor v. Quantum Far East Ltd & Ors; Uma Devi R Balakrishnan (third party) [2003] 4 CLJ 587 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 CLJ 754 HC ***(foll)***
Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram [2000] 4 CLJ 870 ***(foll)***
Yee Chang & Co Ltd v. NV Koninklijke Paketvaart Maatschappij [1958] MLJ 131 ***(refd)***

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3(b)(ii), 5(a), 27(a)

For the plaintiff - R Naidu; M/s Ng Choo Beng, R Naidu & Partners
For the defendant - Malliga Sumathri; M/s Malliga & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Balia Yusof JC:
By way of a summons in chambers, the plaintiffs filed an application to disqualify Puan Malliga a/p G.V. Sumathri of Tetuan Malliga & Associates from representing the defendant and further and in the alternative Tetuan Malliga & Associates from handling the matters of the defendant. The application is grounded firstly, on the basis that the sailI Kandasamy who is the Managing Director of the defendant company. Mr. Balachandran is the main witness for the defendant. Secondly, it is submitted that there arises a conflict of interest on the part of Tetuan Malliga & Associates who has acted for the plaintiff at one time. Thirdly, it was contended by the plaintiff that as a Secretary to the

defendant company, Puan Malliga has a pecuniary interest in the case and as such she should be barred from acting for the defendant company. And lastly it is further contended by the plaintiff that on the facts and circumstances of the case, it is difficult for the said Puan Malliga to maintain her professional independence in dealing with the matter.

In reply to the above, the defendant submits that Tetuan Malliga & Associates and the defendant company are separate legal entities and as such there is no question of embarrassment. Puan Maliga was never in possession of any confidential documents belonging to the plaintiff and this is not prejudicial to the plaintiff and would not be in conflict. It is further submitted by the defendant that being the Secretary of the defendant company is no bar to her acting for the defendant.

I shall now deal with each of the grounds raised by the plaintiff and the reply by the defendant. Firstly the defendant has raised a preliminary objection on the issue that the plaintiff/applicant has failed to make any reply to the averments made by the defendant in encl. 34. The said affidavit in reply was affirmed by one Balachandran a/l Kandasamy, the Managing Director of the defendant company. In her written submission (encl. 39), learned counsel for the defendant, Puan Malliga herself has quoted such authorities as *Ng Hee Thoong & Anor v. Public Bank Bhd.* [1995] 1 CLJ 609 and the case of *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bharu* [1995] 4 CLJ 339 to support her contention. While I fully agree with the proposition of law in the said cases cited by the counsel, it is the duty of the counsel to show and ascertain what are the so called material averments which the plaintiff has failed to reply and whether those averments are material in the first place. This has not been done and I am not in a position to fathom the learned counsel's contention as to which of these averments are material and which need a specific reply by the plaintiff, the failure of which could be fatal to their case. In any event after having perused both the affidavits of the plaintiff and the defendant, I do not find any such positive averments which needed specific reply by the plaintiff and being material for the determination of the matter. It is trite law that only a positive assertion upon a material issue must be contradicted in the evaluation of affidavit evidence, the failure of which would be deemed to be an admission by the party. On the aforesaid reasons, I found the preliminary objection raised by the learned counsel for the defendant to be unsubstantiated and without basis, and accordingly proceed to consider the application on its merits.

On the issue of embarrassment, r. 3 of the Legal Profession (Practice and Etiquette) Rules 1978 states:

3. Advocate and solicitor not to accept brief if embarrassed.

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises:

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

In so far as Puan Malliga is concerned, it is an undisputed fact that she has a personal relationship with Mr. Balachandran a/l Kandasamy, the Managing Director of the defendant company. Mr. Balachandran a/l Kandasamy is the husband of Puan Malliga. Mr. Balachandran a/l Kandasamy is also the main witness for the defendant in the case. Rule 3(b)(ii) above clearly spells out the meaning of embarrassment namely "where there is some personal relationship between him (the advocate and solicitor) and a party or a witness to the proceedings".

The meaning of "personal relationship" has been considered by the Federal Court in *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* [2000] 4 CLJ 870 by referring to its ordinary meaning and at p. 875 of the report this is what the court said:

> What does come within the ambit of "personal relationship"? By its ordinary Concise Oxford Dictionary's meaning of relationship is "the fact or state of being related" and "personal" is relating to or connected with the person. Or to take the meaning of "relation" in the Jowitt's Dictionary of English Law it means" a general word meaning *prima facie* next of kin of any degree or colloquially, kindred of all degrees.

Earlier at the same page, the Federal Court referred to a passage in the judgment of the Court of Appeal in the matter which reads:

> A personal relationship between a solicitor and his client can only mean a relationship (meaning an association) which is personal between them. A working relationship between partners of a firm is not a personal relationship, so that a lawyer can always act for his firm. A sexual relationship between two people is a personal relationship. But a solicitor and client relationship is not a personal relationship. However, there would be a personal relationship between them if their association is something which is more than that of a professional one.

In my judgment, Puan Malliga certainly has a personal relationship with Mr. Balachandran a/l Kandasamy and is thereby prohibited by r. 3 of the Legal Profession (Practice and Etiquette) Rules 1978 from acting for the defendant in the proceedings.

The next ground of objection against Puan Malliga acting for the defendant in the matter is on the issue of conflict of interest. It is alleged by the applicant that the firm Messrs. Malliga & Associates had acted for the plaintiff and had access to documents and other confidential information pertaining to the plaintiff at the time when they were so acting for the plaintiff. The plaintiff has produced exhs. 'A' and 'B' in encl. 32 to prove their point, however my perusal of those two exhibits relates to one Mr. Gengiah s/o Ramasamy and Janakiraman s/o Govindan whose connection with the plaintiff in this case is not clearly shown to the court. However the exhibits did indicate that the two named persons are the officers of the Persatuan Dravidian Malaysia and the plaintiff in the instant case is suing for and on behalf of the Jawatankuasa Pengurusan Persatuan Dravidian Malaysia. Such being the situation, it appears that Puan Malliga may be caught in a very peculiar situation of having acted for the Persatuan earlier and now being its adversary. In this regard, perhaps I should refer to the decision of the New Zealand Court of Appeal in the case of *Black v. Taylor* [1993] 3 NZLR 403 where it was held that "the court may prevent a barrister acting as counsel in a matter which he had a conflict, or in which he appeared to have a conflict of interest such that justice would not be seen to be done". On the facts before me, it certainly appears that Puan Malliga may have a conflict of interest in dealing with the matter, such that justice may not be seen to be done. In coming to this conclusion, I have also considered the fact that Puan Malliga is also a Secretary to the defendant company which is another ground of objection by the plaintiff. Being in that position, the plaintiff contends that Puan Malliga has a pecuniary interest in the case and is thereby prohibited by the provisions of r. 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which states:

> 27(a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.

In *Haji Abdul Ghani b. Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 230, Wan Yahya J (as he then was) expressed the view that any interest relating to money's or moneys worth, any interest that could be converted into money, or any interest the object of which is to make money falls in the category of pecuniary interest. I respectfully share the same view as his lordship and in so doing I have no hesitation in holding that Puan Malliga being the Secretary of the company is pecuniarily interested in the defendant company and therefore

she ought to be prohibited from acting for the company in the matter. It is my considered view that as an officer of the court, a solicitor must always conduct himself with decorum and avoid any situation which may give rise to a conflict of interest. Again when a solicitor is pecuniarily interested in a matter the rule of prudence and good sense dictates that he should abstain from taking up the matter.

Maintaining professional independency has always been the hallmark of a solicitor in handling a matter, and it is for that reason that r. 5 of the Legal Profession (Practice and Etiquette) Rules 1978 has been legislated. Sub rule 5(a) of the said Rules prohibits a solicitor to accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice. Considering the whole scenario of the case, I am of the considered view that, it would be impossible for Puan Malliga to maintain her professional independence in the matter considering the relationship she has with the main witness of the case and her position as a Secretary of the defendant company. It must always be stressed that the right to counsel is not without limitation. In this respect perhaps it is worth repeating what Abdul Malik Ishak J stated in *Syarikat Pengangkutan Sakti Sdn. Bhd. v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754 where His Lordship stated at p. 775:

> The rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right.

On the same note, Zulkifli Makinudin J in *Kayla Beverly Hills (M) Sdn Bhd & Anor v. Quantum Far East Ltd & Ors: Uma Devi R Balakrishnan (third party)* [2003] 4 CLJ 587 spoke of the inherent powers of the court. At p. 593 of the report, His Lordship quoted a passage from the Canadian case of *Carlingwood Motors Ltd v. Nissan Canada Inc.* [2001] ACWSJ 676321 which states as follows:

> As has been noted, this court's jurisdiction to remove lawyers from the record is not to be found in a code of conduct but in the fact that lawyers are officers of the court and their conduct on legal proceedings which may affect the administration of justice is subject to the court's supervisory jurisdiction.

Whyatt CJ, in his judgment in *Yee Chang & Co. Ltd v. NV Koninklijke Paketvaart Maatschappij* [1958] MLJ 131 at p. 133 said:

> It has been said by Lord Wright in *Myers v. Elman* [1940] AC 282 @ 319, that the court has a right and a duty to supervise the conduct of its solicitors and the court would be failing in the discharge of that duty if it passed over the conduct of the defendant's solicitors in this litigation in silence. It has been laid down by the House of Lords in *Myers v. Elman* that a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere the cause of justice.

Finally, I am constrained to say that the court as the guardian of justice will fail in its duty should it allow the provisions of the Legal Profession (Practice and Etiquette) Rules 1978 to be flagrantly violated. Due observance and effect must be given to its provisions. This is essehtial for an effective and respectable Bar. Speaking of its provisions, the Federal Court in *Vijayalakshmi Devi Nadchatiram*'s case *(supra)* at p. 880 observed:

> The objective of the provision lies in the fact that the Bar had set a high standard of practice. The Bar requires that an advocate and solicitor must be able to give an objective and independent judgment before he embarks on the task of advising a client. Thus the advocate and solicitor would not be in a position to do so if he is bound by ties of personal relationship to his client and tied by pecuniary interest. The mischief to be cured and the intention of the Rules are too clear to be ignored. The provisions are too clear to admit of any doubt or dispute. They had been so framed to preserve the integrity of an advocate and solicitor so that he may not be in conflict of interest and by the same token ensures that when he acts for a client he is independent and free *vis-a-vis* both when representing the client and performing his duty as an officer of the court in which he appeared.

For the reasons aforesaid, the application by the plaintiff for Puan Malliga a/p G.V. Sumathri to withdraw herself from handling the above matter is hereby allowed in the terms of prayer (a) in encl. 31 with costs.